92-417

Supreme Court, U.S.
FILED
AUG 17 1992
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IN THE

Supreme Court of the United States

October Term 1992

FREDERICK AXMEAR,

Petitioner,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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August 11, 1992

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QUESTION PRESENTED

Did the Court of Appeals err in failing to decide that the trial court erred in failing to allow the defendant to exercise his right to receive information, pursuant to 26 U.S.C. 6103(h)(5) on whether or not potential jurors had been audited or investigated by the IRS for a period of greater than six years and order a new trial in this action?

LIST OF PARTIES

The parties to the proceedings are the petitioner and the respondent. The petitioner was represented in the trial court and court of appeals by Richard F. Thurston, 3224 Perry Street, Denver, Colorado 80212 ((303) 458-8192).

The respondent was represented at trial and on appeal by Thomas B. Heffelfinger, United States Attorney for the District of Minnesota and Mark R. Pitsenbarger, Margaret E. Burns, and Jon M. Hopeman, Assistant U. S. Attorneys, all of The Office of the United States Attorney, U.S. Courthouse, 234 United States Courthouse, 110 South Fourth Street, Minneapolis, Minnesota

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FREDERICK AXMEAR,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner, FREDERICK AXMEAR respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in the above entitled proceeding May 18, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at ___

F.2d. ____, and is reprinted in the appendix hereto, p. 1.

The decisions of the United States District Court for the District of Minnesota on this issue has not been reported. The decisions are set forth in the appendix hereto.

JURISDICTION

Jurisdiction of the United States District Court for the District of Minnesota to try the case is 18 U.S.C. 3231.

On petitioner's appeal to the United States Court of Appeals, the Court denied the appeal on the issue on May 18, 1992. The jurisdiction of the Court of Appeals to hear the case was invoked under 28 U.S.C. 1291.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. Section

1254(1).

STATUTE INVOLVED

26 U.S.C. Section 6103(h)(5) provides as follows:

(5) Prospective Jurors. In connection with any judicial proceeding described in paragraph (4) to which the United States is a party, The Secretary shall respond to a written inquiry from an attorney of the Department of Justice (including a United States Attorney) involved in such proceeding or any person (or his legal representative) who is a party to such proceeding as to whether an individual who is a prospective juror in such proceeding has or has not been the subject of any audit or other tax investigation by the Internal Revenue Service. The Secretary shall limit such response to an affirmative or negative reply to such inquiry.

STATEMENT OF THE CASE

Petitioner, Frederick Axmear, (hereinafter "defendant"), was charged and convicted of two counts of income tax evasion in violation of 26 USC 7201. The sum and substance of his defense was that, based upon his study of the Internal Revenue Code and other materials, he was not required to file income tax returns.

Prior to trial defendant moved to obtain a list of the prospective jurors in order to exercise his rights pursuant to 26 U.S.C. 6103(h)(5). The Magistrate granted this motion and ordered the government to obtain the information and submit it to the Court in camera for disclosure to the defendant at the appropriate time. The government only obtained information on prospective jurors for six years instead of the twenty-five

year period that was available. The defendant moved the Court for a continuance in order that he could obtain the information for a twenty-five year period. The motion was denied by the Court.

REASONS FOR GRANTING THE WRIT

The decision of the Eighth Circuit is in conflict with the Ninth Circuit. The Ninth Circuit reached a contrary result in U.S. v. Siniqaqalio, 925 F. 2d 339 (9th Cir. 1991).

Peremptory challenges remain one of the most important rights of the accused. Swain v. Alabama, 380 U.S. 202 (1965); United States v. Blanton, 700 F.2d 198 (6th Cir. 1983). See United States v. Scarfo, 850 F. 2d 1015, 1021 (3rd Cir. 1988). "Voir dire" is essential in permitting the intelligent use of peremptory challenges, and the impairment

of peremptory challenge right is reversible error without a showing of prejudice." Blanton, 700 F. 2d 308.

Under Title 26 U.S.C. 6103(h)(5) the criminal defendant who is party to a federal proceeding relating to the matter of his criminal liability is afforded the right to procure information from the Secretary of the Treasury regarding any perspective jurors who may have been the subject of an audit or other tax investigation by the Internal Revenue Service. The information under Title 26 U.S.C. 6103(h)(5) was essential to the defendant in selecting a jury and exercising peremptory challenges of potential jurors. Cf. United States v. Segal, 534 F.2d 578, 581 (3rd Cir. 1976) (stating that parties have right to information which might furnish basis for intelligent exercise of peremptory

challenges.)

The United States Court of Appeals for the Ninth Circuit in United States v. Hashimoto 878 F.2d 1126 (9th Cir. 1989) first interpreted the 26 U.S.C. 6103(h)(5). Therein the Court of Appeals reversed Hashimoto's conviction and remanded it for a new trial as a result of the district court's refusal to grant his motion for jury panel information, which was filed under Title 26 U.S.C. 6103(h)(5).

This same issue was presented to the United States Court of Appeals for the Ninth Circuit in U.S. v. Sinigagalio, 925 F. 2d 339 (9th Cir. 1991). The Court held that the defendant was not limited to an arbitrary six year period in exercising this right. The decision in Sinigagalio is directly in conflict with the decision in the instant case and is the correct

decision on the law regarding the issue.

The Fifth Circuit found that it was harmless error to refuse to grant a continuance to secure information under 26 U.S.C. 6103(h)(5), United States v. Masat, 896 F.2d 88 (5th Cir. 1989).

The First Circuit in United States v. Lussier, 929 F. 2d 25 (1st Cir. 1991) found no error where the prosecutor verified jury members answers prior to the jury being sworn.

The Sixth Circuit upheld implicitly the right to receive such information, though for no particular time period. United States v. Spine, 945 F.2d. 143 (6th Cir. 1991). See also, United States v. Droge, No. 91-1222, 1992 WL 75175 (2nd Cir. April 7, 1992).

Finally, the Eleventh Circuit in U.S. v. Schandl, 947 F. 2d. 462 (11th Cir. 1991), found no error where individual

questions were asked of jurors.

The defendant was denied the right to information for a period greater than six years specifically given to him by statute. The decision of the Ninth Circuit is clearly the correct one. The defendant was entitled to receive the information for more than an arbitrary period and did not receive it.

CONCLUSION

This Court should grant this writ and reverse the judgment of the Eighth Circuit for the reasons set forth herein.

Respectfully submitted,

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

FREDERICK AXMEAR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

APPENDIX

United States Court of Appeals
for the Eight Circuit

No. 91-3660MN

United States of America,	*	
	*	
Appellee,	*	Appeal from
	*	the United
	*	States
	*	District
	*	Court
v.	*	for the
	*	District of
	*	Minnesota.
Frederick Axmear,	*	
	*	
Appellant.	*	

Submitted: May 12, 1992

Filed: May 18, 1992

Before, FAGG, BEAM, AND HANSEN, Circuit Judges.

FAGG, Circuit Judge.

Frederick Eugene Axmear appeals his convictions for income tax evasion. We affirm.

Axmear contends the district court committed reversible error by denying a continuance to obtain additional juror information under 26 U.S.C. Section 6103(h)(5). Under this statute, taxpayer defendant may discover from the Secretary of the Treasury whether their prospective jurors have been audited or investigated by the Internal Revenue Service. More than four months before trial, Axmear sought access to the district court's jury list to use in obtaining this information. To facilitate Axmear's receipt of the information, the district court directed the Government to submit the jury list to the Secretary of the Treasury. The Secretary's response, however, told only whether Axmear's prospective jurors had been audited or investigated during the past six years.

At the beginning of trial, Axmear requested a continuance to discover whether any juror had been audited or investigated during the past twenty-five years. Although the district recognized that without a continuance Axmear would be unable to obtain this additional information, the district court denied Axmear's request. The district court felt it could obtain the same information by questioning the jurors during voir dire.

The Second, Fifth, and Sixth Circuits have concluded the denial of a taxpayer defendant's request for a continuance to obtain additional section 6103(h)(5) information is not reversible when the district court conducts an appropriate voir dire. United States v. Droge, No. 91-1222, 1992 WL 75175, at *4 (2nd Cir. Apr. 7, 1992); United States v. Masat, 948 F.2d 923, 927 (5th Cir. 1991); United

States v. Spine, 945 F.2d 143, 147-48 (6th Cir. 1991). But see United States v. Siniqaglio, 942 F.2d 581, 583 (9th Cir. 1991). We agree.

Before voir dire, the district court stated it would ask the jurors whether they had ever been audited or investigated. Axmear agreed the district court's proposed question would elicit the same information sought under section 6103(h)(5). Indeed, when the district court asked the question during voir dire, several jurors admitted they had been audited. Axmear did not object to the district court's voir dire, and he remained silent when given the opportunity to propose additional questions about the jurors' audit histories. In these circumstances, we conclude Axmear suffered no prejudice from the district court's

denial of his request for a continuance. See United States v. Holden, No. 91-3079. slip op. at 3 (8th Cir. May 8, 1992); Droge, 1992 WL 75175, at *7-8; Masat, 948 F.2d at 927; Spine, 945 F.2d at 148.

Axmear also contends the district court should have granted his pretrial motion for dismissal, or alternatively his motion for acquittal, because the tax instruction booklets for the years he evaded taxes do not display Office of Management and Budget control numbers. See 44 U.S.C. Sections 3501-3520 (1988). This contention is foreclosed by our holding in Holden, Slip. op. at 3-4. Accordingly, we affirm Axmear's convictions.

THE RULING OF THE DISTRICT COURT IS SET FORTH BELOW FROM THE TRANSCRIPT OF THE TRIAL

VOLUME I PAGES 2-4

* * * * * * *

September 9, 1991

- - -

(in Chambers)

THE COURT: Go ahead.

MR. THURSTON: For the record, Your Honor, it is my understanding from Ms. Burns that the government had agreed to comply with he defendant's motion to submit names to the Secretary of the Treasury under 26 USC 6103(h)(5) -- I believe is the statute number -- and that they have agreed to furnish the information to the court and to the defendant for use in the jury selection process; and it is my further

understanding that they have in fact done that, and submitted a list of people in response to the query as to whether or not they have been audited or not, the "yes" or "No" format. I have not seen it because it was submitted the court, but I understand from the court that that has been done.

However, I understand from Ms. Burns, the Assistant U.S. Attorney, that the IRS only went back six years. It is my understanding the they have the capability of going back 25 years, and we would request they go back 25 years and if necessary, to continue the trial to do that.

THE COURT: Ms. Burns?

MS. BURNS: It is the government's position that the order did not require any specific time period to be searched for the information related to the jury

panel members. It is the practice in this district, it is our understanding, to go back six years when searching for jury panel information under that procedure. The IRS internal procedure manual specifies that they will go back as far as the information is available.

It is our understanding that the information is available on computer records for six years for these people. After six years, the information is stored on microfilm in some IRS depository, and it is a great administrative burden to search past six years for any records maintained on the jury panel people. Because of the administrative burden, the IRS has interpreted the internal procedure manual to require them to go only search back six years because that is how far back the material is available in that sense to the IRS.

Further, the government feels that any perceived prejudice to the defendants, because of the time limitation, can be cured by voir dire. You may ask the jurors, in an unlimited time frame, whether they have been audited by the IRS, so any prejudice that might occur because of the limited time frame is harmless and can be cured on voir dire.

THE COURT: Mr. Thurston, anything else?

MR. THURSTON: Yes sir, for the record, I believe the key cases in the situation are U.S. versus Heshamoto (phonetic), which is a Ninth Circuit case, and there is a case of U.S. versus Massoth (phonetic) --I think that was out of Texas -- I can't remember which circuit it is -- where they found that it was error not to go back --but they did not reverse on it. My understanding of the legislative

history and the statute is that id doesn't give any time limit, so that the defendant would be entitled to information as far as they can go back. In prior cases I have had them go back 25 years.

THE COURT: I'll tell you what I am going to do:

I am going to deny your motion to continue the trial.

I think, by the force of that denial, it would probably make, you know, impossible to grant your motion to go back 25 years -- although I am not even going to deal with that; I think it just moot -- but what I will do is ask each of the venire persons whether they in fact have been audited.

And I will talk enough about it by that time so that they will have had their memories jogged to the point where they will remember, and I will ask each and

every one of them whether they have ever been audited by the IRS.

Is that the form of the question that you want, Mr. Thurston.

MR. THURSTON: Or whether they were investigated, I believe the statute says.

THE COURT: Investigated?

MR. THURSTON: I don't have it in front of me. I think there is some sort of vague language -- in addition to audit -- there.

THE COURT: Well, whatever the statute requires and whatever you think ought to be done, I will do. What do you think it is?

MS. BURNS: I think it is general subject to an IRS audit or other tax investigation.

MR. THURSTON: Okay (nods head up and down).

THE COURT: Well, then we will do it

that way.

Is that the way it is stated in the form, the part of the form I have seen already?

MS. BURNS: Yes, Your Honor. I believe that refers to federal tax investigations because, since it was the IRS who was doing the search for information, they would not be able to come up with state tax investigations.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether comprehensive voir dire concerning tax audits and investigations rendered harmless the district court's refusal to grant a continuance requested by petitioner so that he could obtain additional jury panel information pursuant to 26 U.S.C. 6103(h)(5).

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 11-15) is reported at 964 F.2d 792.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1992. The petition for a writ of certiorari was filed on August 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted of two counts of willfully attempting to

evade income tax, in violation of 26 U.S.C. 7201. Pet. 4.

1. More than four months before trial, petitioner sought access to the district court's jury list so that he could request information about prospective jurors from the Secretary of the Treasury pursuant to 26 U.S.C. 6103(h)(5). Pet. App. 12. That statute provides that the Secretary shall respond to a request from a party to a tax case for information concerning whether any prospective juror in the case has ever been the subject of an IRS audit or investigation.[1] The Secretary is limited to making a simple affirmative or negative response as to each juror.[2]

---

[1] Section 6103(h)(5) provides:

> In connection with any judicial proceeding [concerning a taxpayer's liability under the tax laws] to which the United States is a party, the Secretary [of the Treasury] shall respond to a written inquiry from an attorney of the Department of Justice (including a United States attorney) involved in such proceeding or any person (or his legal representative) who is a party to such proceeding as to whether an individual who is a prospective juror in such proceeding has or has not been the subject of any audit or other tax investigation by the Internal Revenue Service. The Secretary shall limit such response to an affirmative or negative reply to such inquiry.

[2] The Revenue Act of 1992, H.R. 11, 102d Cong., 2d Sess. § 4905 (1992), would have repealed 26 U.S.C. 6103(h)(5) for proceedings pending on or commenced after the date of enactment. H.R. 11 was approved by the Senate, 138 Cong. Rec. S17,685-S17,707 (daily ed. Oct. 8, 1992), and House of Representatives, 138 Cong. Rec. H11,640-H11,656 (daily ed. Oct. 5, 1992), and sent to the President. It was, however, the subject of a pocket veto. See 28 Weekly Comp. Pres. Doc. 2283 (Nov. 4, 1992).

The district court directed the government to submit the jury list to the Secretary of the Treasury so that the Secretary could provide the requested information. The government did so, and the Secretary provided information as to whether the prospective jurors had been audited or investigated during the previous six years. Pet. App. 12.

At the beginning of trial, petitioner requested a continuance to inquire whether any juror had been audited or investigated during the past 25 years. Pet. App. 17. The district court denied that request. Pet. App. 20. Instead, the court determined that the requirements of Section 6103(h)(5) would be satisfied if, during voir dire, the court asked each of the prospective jurors whether he or she had ever been audited or investigated by the Internal Revenue Service (IRS). Pet. App. 20-21. Petitioner agreed that the district court's proposed questions would elicit the same information sought under Section 6103(h)(5). Pet. App. 14.

During voir dire, the district court asked each potential juror whether he or she had ever been audited or investigated by the IRS. In response to the court's questioning, several jurors stated that they had been audited. After selecting 30 members of the panel, the district court again asked whether any member of the panel had ever been audited or investigated by the IRS. Gov't C.A. Br. 2-3. Petitioner did not object to the district court's voir dire, and he did not respond when given the opportunity to ask additional questions concerning the prospective jurors' audit histories. Pet. App. 14.

2. On appeal petitioner argued, *inter alia*, that the district court erred in denying his request for a continuance to obtain additional jury panel information under Section 6103(h)(5). Pet. App. 12. Relying on its own precedent, as well as cases from the Second, Fifth, and Sixth Circuits, the court of appeals concluded that the denial of a defendant's request for a continuance to obtain additional Section 6103(h)(5) information is not reversible error when the district court conducts an appropriate voir dire. Pet. App. 13-14. The court held that, in light of the district court's inquiry during voir dire and petitioner's lack of objection to that inquiry, petitioner was not prejudiced by the district court's denial of his request for a continuance. Pet. App. 14-15.

ARGUMENT

1. The court of appeals correctly ruled (Pet. App. 14-15) that petitioner could not demonstrate that he had suffered any prejudice as a result of any alleged deficiencies in the Secretary's response to his Section 6103(h)(5) request.[3] Petitioner bases his claim of prejudice primarily on the fact that the Section 6103(h)(5) information he received from the Secretary covered only a six-year period, while he had requested such information for a 25-year period. Pet. 9. The

[3] This Court has recently denied three petitions for a writ of certiorari similarly presenting the question whether a thorough voir dire of prospective jurors could render harmless an alleged deficiency in providing a defendant with Section 6103(h)(5) information from the IRS. See *Holden* v. *United States*, No. 92-5443 (Nov. 2, 1992); *Masat* v. *United States*, 113 S. Ct. 108 (1992); *Schandl* v. *United States*, 112 S. Ct. 2946 (1992).

voir dire questioning by the judge, however, elicited each prospective juror's lifetime audit history. Indeed, petitioner agreed that the district court's proposed questions would elicit the same information that he sought under Section 6103(h)(5). Pet. App. 14. Petitioner did not object to the district court's voir dire, and he did not respond when given the opportunity to ask additional questions concerning the prospective jurors' audit histories. Pet. App. 14.

Courts presume that jurors respond truthfully to questions on voir dire, even sensitive or potentially embarrassing questions. *United States* v. *Huguenin*, 950 F.2d 23, 30 (1st Cir. 1991); *United States* v. *Spine*, 945 F.2d 143, 148 (6th Cir. 1991); *United States* v. *Masat*, 896 F.2d 88, 95 (5th Cir. 1990). Thus, absent evidence to the contrary, the voir dire in this case is presumed to have remedied any possible deficiencies in the Secretary's 6103(h)(5) response. Petitioner's receipt of the Section 6103(h)(5) information through voir dire accordingly overcame any prejudice that petitioner could have suffered. Accord *United States* v. *Holden*, 963 F.2d 1114, 1116 (8th Cir. 1992), cert. denied, No. 92-5443 (Nov. 2, 1992); *United States* v. *Huguenin*, 950 F.2d at 30; *United States* v. *Masat*, 948 F.2d 923, 926-927 (5th Cir. 1991), cert. denied, 113 S. Ct. 108 (1992); *United States* v. *Hicks*, 947 F.2d 1356, 1360-1361 (9th Cir. 1991); *United States* v. *Schandl*, 947 F.2d 462, 469 (11th Cir. 1991), cert. denied, 112 S. Ct. 2946 (1992); *United States* v. *Spine*, 945 F.2d at 145-148; *United States* v. *Hardy*, 941 F.2d 893, 895-896 (9th Cir. 1991); *United States* v. *Masat*, 896 F.2d at 94-95.

2. The decision of the court of appeals in this case is not in conflict with decisions of other circuits. In *United States* v. *Hashimoto*, 878 F.2d 1126 (9th Cir. 1989), which petitioner cites (Pet. 7), the court held that a presumption of a significant risk of prejudice is created by the denial of juror audit and investigation information, but the court specifically stated that the presumption "might be overcome if the examination of jurors during voir dire is such that the inference of risk of prejudice is negated."[4] 878 F.2d at 1134. In *United States* v. *Sinigaglio*, 942 F.2d 581, 583 (9th Cir. 1991), the case on which petitioner primarily relies, the Ninth Circuit held that it would not adopt a per se rule requiring reversal for the denial of Section 6103(h)(5) information, but found that the voir dire in that case did not negate the significant risk of prejudice created by the incomplete disclosure of audit information.

[4] We believe that a presumption of prejudice with respect to a violation of Section 6103(h)(5) is inappropriate. This Court has consistently upheld the presumption of a prospective juror's impartiality. See, *e.g.*, *Murphy* v. *Florida*, 421 U.S. 794, 800 (1975). There is no reason to believe that a violation of Section 6103(h)(5) is sufficient to rebut that presumption, for the fact that a juror may have been subject to an IRS audit or investigation is not by itself enough to establish bias for or against any party. Moreover, as a Report to the Administrative Conference of the United States observed, if an IRS investigation is apt to result in any bias, it is more likely to be against the government than against the defendant. S. Doc. No. 266, 94th Cong., 2d Sess. 1114 n.534 (1976) ("[p]resumably, very few taxpayers come out of a tax investigation with a pro-government bias"). See also *United States* v. *Droge*, 961 F.2d 1030, 1036 (2d Cir. 1992), petition for cert. pending, No. 92-5735; *United States* v. *Huguenin*, 950 F.2d 23, 30 (1st Cir. 1991).

In *United States* v. *Hardy*, 941 F.2d 893, 895-896 (9th Cir. 1991), the Ninth Circuit reaffirmed its decision to apply harmless error analysis to the incomplete disclosure of Section 6103(h)(5) information. In that case, voir dire questions that were "entirely specific and paraphrased the statute" were found sufficient to rebut what the court found to be the presumption of a significant risk of prejudice created when the petitioner was initially provided incomplete information. Most recently, in *United States* v. *Hicks*, 947 F.2d 1356 (9th Cir. 1991), the Ninth Circuit again applied harmless error analysis and affirmed the defendant's conviction based on his failure to allege, and his inability to prove, any prejudice. Thus, the decision of the court of appeals in this case does not conflict with any decision of the Ninth Circuit.

The decision in this case is also fully in accord with decisions of the First, Second, Fifth, Sixth, and Eleventh Circuits. See *United States* v. *Droge*, 961 F.2d 1030 (2d Cir. 1992), petition for cert. pending, No. 92-5735; *United States* v. *Huguenin*, *supra*; *United States* v. *Schandl*, *supra*; *United States* v. *Masat*, *supra*; *United States* v. *Spine*, *supra*; *United States* v. *Lussier*, 929 F.2d 25, 29-30 (1st Cir. 1991). As the First Circuit commented in *Huguenin*, any deficiencies in Section 6103(h)(5) information can be remedied on voir dire because "courts ordinarily presume veniremen to tell the truth on voir dire," 950 F.2d at 30, and, in any event, "even if some jurors were not to tell the truth on voir dire, the 'risk of prejudice' to which their falsehoods would expose a tax defendant is ephemeral." *Ibid.* Thus, there is no inter-circuit conflict requiring resolution by this Court, and the

court of appeals' factbound harmless error determination does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1992